No. 15,841

IN THE

United States Court of Appeals

For the Ninth Circuit

JOGINDAR SINGH CLAIR,
Appellant,

vs.

BRUCE G. BARBER, as District Director, Immigration and Naturalization Service, San Francisco District,
Appellee.

On Appeal from the United States District Court for the Northern District of California.

APPELLANT'S REPLY BRIEF.

ROBERT B. McMILLAN,
625 Market Street,
San Francisco 5, California,
PHELAN & SIMMONS,
ARTHUR J. PHELAN,
MILTON T. SIMMONS,
1210 Mills Tower,
San Francisco 4, California,
Attorneys for Appellant.

FILED
PAUL P. O'BRIEN, C

Subject Index

Table of Authorities Cited

No. 15,841

IN THE

United States Court of Appeals

For the Ninth Circuit

JOGINDAR SINGH CLAIR,
Appellant,

vs.

BRUCE G. BARBER, as District Director, Immigration and Naturalization Service, San Francisco District,
Appellee.

On Appeal from the United States District Court for the Northern District of California.

APPELLANT'S REPLY BRIEF.

Appellee contends that the discretion of the Board of Immigration Appeals to deny suspension of deportation is not reviewable. Appellant contends that it is reviewable if abuse of discretion or arbitrary action is involved.

Appellee relies principally upon the following decisions:

Kaloudis v. Shaughnessy, (C.A. 2) 180 F. 2d 489;

Wolf v. Boyd, (C.A. 9) 238 F. 2d 249 (cert. den. 353 U.S. 936);

Jay v. Boyd, 351 U.S. 345, 76 S.Ct. 919, 100 L. Ed. 1242;

Hintopoulos v. Shaughnessy, (C.A. 2) 233 F. 2d 705, affirmed 353 U.S. 72, 77 S.Ct. 618, 1 L.Ed 2d 652.

In those cases the Courts found that the administrative discretion had not been abused, that the administrative action had not been arbitrary or capricious and that it had not been actuated by irrelevant considerations. In each of those cases, the language of the opinion indicates that the result would have been otherwise if arbitrary action or abuse of discretion had been found. For example, in *Wolf v. Boyd,* supra, this Court said at page 254:

> "As Judge Frank of the Second Circuit in the Adel case said:
>
> 'The courts cannot review the exercise of such discretion, they can interfere *only when there has been a clear abuse of discretion or a clear failure to exercise discretion.' U.S. ex rel Adel v. Shaughnessy,* 1950, 183 F.2d 371, 372." (Italics added.)

This Court in the *Wolf* case, supra, also quoted the following from the opinion of Judge Hand in the *Kaloudis* case, supra:

> "We will assume *arguendo* that the contrary might appear; i.e., that the reason given might have been so clearly irrelevant that a court could say that the Attorney General had transgressed the statute,"

Both the *Wolf* case and the *Kaloudis* case involved membership in proscribed organizations. There is

nothing in either decision which would conflict with the principle laid down in the case of *Mastrapasqua v. Shaughnessy,* (C.A. 2) 180 F. 2d 999, wherein the Court of Appeals for the Second Circuit held that the Board abused its discretion in denying suspension of deportation on the sole ground that the alien's entry into the United States in 1940 had been due to wartime events, because the classification was arbitrary and unreasonable. Throughout the opinions in the *Wolf* case and the *Kaloudis* case, supra, are expressions recognizing that denial of discretionary relief on grounds which are arbitrary or capricious constitutes an abuse of discretion which is reviewable by the Courts. This is again clear from the following additional statement of this Court in the *Wolf* case, supra:

> "Further, the courts have no reviewing power under claim of due process of law *unless the denial of discretionary relief was arbitrary.*" (Italics added.)

In *Jay v. Boyd,* supra, (a case also involving membership in proscribed organizations), the Supreme Court construed the statute as permitting decisions based on matters outside the administrative record "at least when such action would be *reasonable.*" In that case, the Supreme Court found that the regulations permitting use of confidential information where disclosure would be prejudicial to the public interest, safety or welfare was "a *reasonable* class of cases in which to exercise that power." Thus again the Court applied the test of reasonableness of classification in determining the propriety of the administrative action.

Appellee also places strong reliance on the decision of the Court of Appeals in the case of *Hintopoulos v. Shaughnessy,* supra, but the decision of the Court of Appeals in that case contained the following language:

> "Only if the discretion is shown to have been formulated on arbitrary or illegal considerations, may the courts interfere" (p. 708).

The same exception was recognized in the decision of the Supreme Court in the *Hintopoulos* case, since in that case the Court specifically stated:

> "Nor can we say that it was abuse of discretion to withhold relief in this case. The reasons relied on by the hearing officer and the Board—namely, the fact that petitioners had established no roots or ties in this country—were *neither capricious nor arbitrary.*" (Italics added.)

Here again is recognition that where there is abuse of discretion or arbitrary and capricious action, the administrative decision may be subject to judicial review. Thus there is nothing in the *Hintopoulos* opinion inconsistent with the *Mastrapasqua* decision, supra.

In the case at bar, like the *Mastrapasqua* case, supra, the Board has endeavored to set up an arbitrary classification of persons to whom discretionary relief will not be granted. This classification is aimed solely at aliens who arrived as seamen; it is limited to those who at the time of arrival were employed on ships registered to some country which *later* became a cobelligerent of the United States in World War II; the classification does not include aliens who came as

stowaways, transits, visitors, or border jumpers, nor does it include seamen who arrived on neutral, German, or Italian ships. The failure to perform further sea service in World War II is made the basic consideration for denial of the discretionary relief, and no cognizance is taken of the fact that the appellant registered in the United States for Selective Service and was subject to such service, military or civilian, which the United States may have chosen to require of him. We submit that this classification is fully as arbitrary and capricious as was the classification involved in the *Mastrapasqua* case, supra. In the last-mentioned case, the Board said in effect "We will not grant him relief because he arrived on an Italian ship and did not depart because of war-time conditions;" in the case at bar, the Board in effect says "We will not grant him relief because he arrived on a British ship and did not continue to serve further as a seaman." In principle, the situations are the same. The consideration invoked by the Board in the one case is just as remote from the relevant factors pertaining to the relief of suspension of deportation as it is in the other. Unless it can be said that denial of suspension of deportation cannot be reviewed even if based upon an arbitrary classification, we submit that the case should be remanded to the immigration authorities for decision of the application upon its merits as this Court did in *Barber v. Lal Singh*, 247 F. 2d 213.

CONCLUSION.

We respectfully submit that to deny suspension of deportation on the sole basis that the person arrived as a seaman in 1940 and did not thereafter perform sea service constitutes abuse of discretion and arbitrary and capricious action, that by the imposition of an unreasonable classification appellant has been denied discretionary consideration on his application on its merits and that under the principles of the *Mastrapasqua* and *Lal Singh* decisions, supra, the matter should be remanded to the administrative authorities for consideration of the application for suspension of deportation without regard to the consideration upon which it has heretofore been rejected by the Board.

We respectfully submit that the decision of the Court below is erroneous and should be reversed.

Dated, San Francisco, California,
May 7, 1958.

ROBERT B. MCMILLAN,
PHELAN & SIMMONS,
ARTHUR J. PHELAN,
MILTON T. SIMMONS,
Attorneys for Appellant.